UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 1:16-cv-02113 (JDB) Hon. John D. Bates

DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In April 2015, Defendant U.S. Equal Employment Opportunity Commission ("EEOC") provided notice that it was planning to amend its regulations under the Americans with Disabilities Act ("ADA") to authorize employers to incentivize employees to participate in wellness programs. *See* EEOC, Amendments to Regulations Under the Americans with Disabilities Act, 80 Fed. Reg. 21,659 (Apr. 20, 2015) ("2015 ADA Proposed Rule"). The EEOC provided notice of its intent to correspondingly amend regulations under Title II of the Genetic Information Nondiscrimination Act ("GINA") in October 2015. *See* EEOC, Genetic Information Nondiscrimination Act of 2008, 80 Fed. Reg. 66,853 (Oct. 30, 2015) ("2015 GINA Proposed Rule"). Both rules were finalized in May 2016 and apply beginning in January 2017. *See* EEOC, Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126 (May 17, 2016) ("2016 ADA Final Rule"); EEOC, Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31,143 (May 17, 2016) ("2016 GINA Final Rule"). Across the country, employees are currently selecting their 2017 health insurance coverage at rates that reflect the existence of these wellness programs.

More than five months after the final rules were promulgated, Plaintiff AARP filed suit in this Court under the Administrative Procedure Act and moved for a preliminary injunction. *See* ECF Nos. 1 ("Compl."), 2 ("Pl's Mot."). The Court should deny Plaintiff that "extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689 (2007), for multiple independent reasons.

At the outset, Plaintiff has failed to meet its burden of establishing standing to bring this suit. The AARP does not contend that it is itself affected by the challenged regulations, and it instead relies exclusively on a theory of associational standing under *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977). But while Plaintiff has submitted declarations from three individuals who baldly state that they are "members" of the AARP, Plaintiff has submitted no evidence that the AARP is an actual membership organization with members who bear the

"indicia of membership," which include "electing the leadership of the association, guiding the association's activities, and financing those activities." *Conservative Baptist Ass'n of Am., Inc. v. Shinseki*, 42 F. Supp. 3d 125, 133 (D.D.C. 2014) (Bates, J.). To the contrary, it appears that the individuals referred to by the AARP as "members" do not select the organization's leadership, have no role in guiding its activities, and only sometimes fund a relatively minor portion of its activities. Plaintiff must establish its standing to the summary judgment standard in order to obtain a preliminary injunction, and it has failed to do so here.

Even if the Court could treat the three individuals whom Plaintiff has identified as members of the AARP for purposes of associational standing, those individuals do not themselves have standing to bring all the claims in this lawsuit. The challenged regulations govern employers, not employees; because the individual declarants are not subjected to the regulations that they challenge, "standing is 'substantially more difficult to establish.'" *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562 (1992)). Of the three declarations, one does not allege that the declarant has access to a wellness program and the other two declarants do not allege that their spouses' medical information has ever been or will ever be requested, nor do they make clear that they have not previously submitted their medical information in connection with wellness programs. At an absolute minimum, all three individuals plainly lack standing to challenge the GINA Rule, which deals exclusively with incentives for spousal medical information.

Even if Plaintiff could overcome these standing hurdles, its request for a preliminary injunction would still fail for lack of irreparable injury. Plaintiff contends that the challenged rules impinge on its members' medical privacy by requiring them to turn over private medical data in exchange for incentives, but the existing statutory and regulatory regime makes clear that

individually identifiable medical information submitted in connection with wellness programs cannot be disclosed to employers and cannot be used to discriminate against employees in any respect. Moreover, as many cases have concluded, Plaintiff's inexplicable, months-long delay in filing suit "implies a lack of urgency and irreparable harm." *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005).

Should the Court reach the substance of this case, Plaintiff is not likely to succeed on the merits. The heart of Plaintiff's case is that a statutory requirement that participation in wellness programs be "voluntary" precludes the use of incentives, but the Supreme Court has made clear in a variety of different contexts that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties"; indeed, such a holding is "philosophical determinism by which choice becomes impossible." *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937). Here, where even Plaintiff concedes that the EEOC has authority to interpret the ADA and GINA under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), it cannot be seriously alleged that the EEOC has strayed so far from the meaning of the statutes as to warrant a preliminary injunction.

Finally, the public interest and the balance of the equities weigh against Plaintiff. Plaintiff's arguments on these factors largely repeat its arguments on irreparable harm, but as noted above there is little risk of improper disclosure because the statutory and regulatory regimes strongly protect individuals' confidential medical information. Moreover, an injunction could bring about chaos in the health insurance market, as employees are currently selecting coverage for 2017 based on rates that have been set to reflect the existence of employee wellness programs.

For any one of these reasons, or all of them, the Court should deny Plaintiff's motion for a preliminary injunction.

BACKGROUND

For decades, the federal government has sought to address the rising cost of health care. Among many other initiatives brought to bear upon this problem, the government has sought to facilitate the use of wellness programs offered by employers to their employees. "[E]xamples of wellness programs include programs to help you stop smoking, diabetes management programs, weight loss programs, and preventative health screenings." *See* Healthcare.Gov, Wellness Programs, https://www.healthcare.gov/glossary/wellness-programs. The basic idea is that when the insured population takes steps to become healthier, it costs less to provide medical care, and employees can pay lower premiums and other costs.

Many wellness programs "obtain medical information from employees by asking them to complete a health risk assessment (HRA) and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol)." 2016 ADA Final Rule, 81 Fed. Reg. at 31,126. The fundamental merits question in this case concerns the ability of employers to incentivize their employees to participate in HRAs by adjusting their premiums for participation.[1] Three overlapping statutory regimes are relevant to that analysis.

I. Statutory Background

The Americans with Disabilities Act was enacted in 1990. Title I, which is at issue in this case, prohibits employers from "requir[ing] a medical examination" and provides that they shall not "make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). The ADA separately provides, however, that a "covered entity may conduct voluntary medical examinations,

[1] Defendant agrees that incentives under GINA and the ADA can include both discounts and penalties. *See* Pl's Mot. at 1 n.1.

including voluntary medical histories, which are part of an employee health program." *Id.* § 12112(d)(4)(B).

The Genetic Information Nondiscrimination Act was enacted in 2008. Title II, which is at issue in this case, provides that an employer may not "request, require, or purchase genetic information with respect to an employee or a family member of the employee," 42 U.S.C. § 2000ff-1(b), except where, among other things, "health or genetic services are offered by the employer, including such services offered as part of a wellness program," *id.* § 2000ff-1(b)(2)(A), provided that (among other things) "the employee provides prior, knowing, voluntary, and written authorization," *id.* § 2000ff-1(b)(2)(B). The genetic information of an individual includes "such individual's genetic tests," *id.* § 2000ff(4)(A)(i), "the genetic tests of family members of such individual," *id.* § 2000ff(4)(A)(ii), and (as relevant here) "the manifestation of a disease or disorder in family members of such individual," *id*. § 2000ff(4)(A)(iii) (emphasis added), including the spouse of such individual. Critically, the "genetic information" of an individual does not include "the manifestation of disease or disorder" in the individual himself. Thus, for example, whether an employee is diabetic is the employee's current health status, not his genetic information; whether the employee's sister is diabetic *is* the employee's genetic information.

As enacted in 1996, the Health Insurance Portability and Accountability Act ("HIPAA") provided that group health plans and health insurance issuers could not discriminate on the basis of "any health status related factor," but the statute made clear that this prohibition was not meant to preclude "premium discounts or rebates modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention." 29 U.S.C. § 1182(b)(2)(B); *see also* 26 U.S.C. § 9802(b); 42 U.S.C. § 300gg-4(b). In 2010, the Affordable Care Act ("ACA") amended these nondiscrimination provisions by providing that

wellness programs could offer rewards of up to thirty percent of the cost of coverage in which the participant and any dependents are enrolled, in exchange for participation. *See* 42 U.S.C. § 300gg-4(j)(3)(A); 29 U.S.C. § 1185d(a)(1); 26 U.S.C. 9815(a)(1).[2]

II. Regulatory History

The EEOC administers Title I and parts of Title V of the ADA, as well as Title II of GINA. In 2000, the EEOC issued ADA Enforcement Guidance stating that a "wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate." EEOC, EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (ADA) ¶ 22, https:// www.eeoc.gov/policy/docs/guidance-inquiries.html#10. The EEOC's 2010 GINA regulations, *see* EEOC, Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (Nov. 9, 2010), similarly provided that the exception for wellness programs "applies only where . . . [t]he provision of genetic information by the individual is voluntary, meaning the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it." 29 C.F.R. § 1635.8(b)(2)(i)-(i)(B).

Following the 2010 enactment of the ACA, which reflected Congressional intent to facilitate the use of employee wellness programs, the EEOC began the process of amending its regulations under the ADA and GINA. On May 17, 2016, the EEOC issued the ADA regulation that Plaintiff challenges here. *See* 2016 ADA Final Rule. In relevant part, the rulemaking amended 29 C.F.R. § 1630.14 to provide that the "use of incentives (financial or in-kind) in an employee wellness program, whether in the form of a reward or penalty, will not render the program

[2] The law further provided that the Secretaries of the Treasury, Labor, and Health and Human Services could raise this limit to 50% "if the Secretaries determine that such an increase is appropriate." 42 U.S.C. § 300gg-4(j)(3)(A).

involuntary if the maximum allowable incentive under the program" does not exceed thirty percent of the total cost of self-only coverage under the group health plan in which the employee is enrolled, or similar coverage. *See* 29 C.F.R. § 1630.14(d)(3).

That same day, the EEOC issued the GINA regulation that Plaintiff challenges here. *See* 2016 GINA Final Rule. Because an employee's spouse's "manifestation of disease or disorder" is the *employee's* genetic information under Title II of GINA, the 2016 GINA Rule narrowly amended 29 C.F.R. § 1635.8 to provide that an employer may offer an inducement to an employee when his or her spouse provides information about the *spouse's* manifestation of disease or disorder (which is not the spouse's genetic information) as part of a health risk assessment. *Id.* § 1635.8(b)(2)(iii). The regulation continues to bar the use of inducements (1) for an employee to provide the employee's own genetic information, *see id.* § 1635.8(b)(2)(i)(B), (2) for the spouse to provide the spouse's own genetic information, *id.* § 1635.8(b)(2)(iii), and (3) for the employee or the spouse to provide "information about the manifestation of disease or disorder in an employee's children or for genetic information about an employee's children, including adult children," *id.*

STANDARD OF REVIEW

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014). The final two factors "merge when the

Government is the opposing party" and are appropriately considered together. *Nken v. Holder*, 556 U.S. 418, 435 (2009).[3]

ARGUMENT

I. Plaintiff Has Failed To Meet Its Burden Of Establishing Standing.

The first reason why Plaintiff cannot obtain a preliminary injunction is that it has failed to establish its standing to bring this action. *See, e.g.*, *Barton v. Dist. of Columbia*, 131 F. Supp. 2d 236, 243 n.6 (D.D.C. 2001) ("The first component of the likelihood of success on the merits prong usually examines whether the plaintiffs have standing in a given case.") (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)). "It is well-established that 'each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Food & Water Watch v. Vilsack*, 808 F.3d 905, 912 (D.C. Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 167-68 (1997)).

In "determining whether or not to grant [a] motion for preliminary injunction," the correct approach is to "evaluat[e] Plaintiffs' standing to bring their claims under the heightened standard for evaluating a motion for summary judgment," *id.* at 912. Accordingly, to establish standing to seek a preliminary injunction, Plaintiff "cannot rest on such mere allegations as would be appropriate at the pleading stage but must set forth by affidavit or other evidence specific facts, which will be taken to be true." *Food & Water Watch v. Vilsack*, 79 F. Supp. 3d 174, 186 (D.D.C. 2015) (citations and alterations omitted)), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015); *see also, e.g.*, *Doe*

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[3] The D.C. Circuit has suggested, without explicitly deciding, that the "sliding scale" approach (pursuant to which a strong showing on one factor can make up for a weak showing on another) is foreclosed by *Winter*. *See Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). In any event, the failure to demonstrate a likelihood of success on the merits alone is sufficient to defeat a motion for a preliminary injunction. *See Gilardi v. Sebelius*, No. 13-104, 2013 WL 781150, at *3 (D.D.C. Mar. 3, 2013).

v. Rumsfeld, 297 F. Supp. 2d 119, 130 (D.D.C. 2003) ("Mere allegations will not support standing at the preliminary injunction stage." (quoting *Doe v. Nat'l Bd. Med. Exam'rs*, 199 F.3d 146, 152 (3d Cir. 1999)); *Am. Federation of Gov't Emps., AFL-CIO v. Vilsack*, 118 F. Supp. 3d 292, 298 (D.D.C. 2015) ("[P]laintiffs needed to meet the evidentiary burden required to establish standing at the summary judgment stage because the plaintiffs sought a preliminary injunction."), *appeal pending*.

Plaintiff's complaint alleges that it has standing exclusively on a theory of associational standing. *See* Compl. ¶ 14. That theory requires it to demonstrate that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Here, Plaintiff has failed to submit sufficient evidence that it satisfies the first two of these requirements, and it has thus failed to meet its burden of establishing jurisdiction.

A. Plaintiff Has Not Submitted Evidence Demonstrating That At Least One Of Its Members Would Have Standing To Sue In His Or Her Own Right.

The first problem with Plaintiff's attempt to invoke associational standing is that it has failed to demonstrate that at least one of its members would have standing to sue in his or her own right. The three declarations of supposed "members" that Plaintiff has submitted both (1) fail to establish that the declarant is actually a member of the AARP within the meaning of associational standing case law, and (2) fail to establish that the declarant would have standing to sue.

1. Plaintiff Has Not Sufficiently Demonstrated That Any Declarant Is A Member Of The AARP For Purposes Of Associational Standing.

Plaintiff has submitted three declarations from self-identified members of the AARP. *See* ECF No. 3.[4] Each alleges, without any additional information, that the declarant is a "member in good standing of AARP." It is well established, however, that an organization's bare reference to individuals as "members" does not make those individuals "members" for purposes of associational standing.[5] *See, e.g.*, *Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 210 (D.D.C. 2007) ("no authority" for proposition that "whether the individuals view themselves as members of the organization and whether they are viewed by the organization as members" is dispositive).

To determine whether an individual is a member of an organization for associational standing purposes, "the Court looks to whether that individual possesses the 'indicia' of membership, which include electing the leadership of the association, guiding the association's activities, and financing those activities." *Conservative Baptist Ass'n of Am.*, 42 F. Supp. 3d at 133; *see also, e.g.*, *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (no associational standing where no evidence that "supporters" "play any role in selecting ALF's leadership, guiding ALF's activities, or financing those activities"); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 26-27 (D.C. Cir. 2002) (organization that purported to act on behalf of an "informal consortium" of

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[4] Plaintiff has moved to file these declarations under seal. *See* ECF No. 3. Defendant is not opposing that motion and will accordingly refer to the declarants by the identifiers used by Plaintiff — that is, Declarants A, B, and C.

[5] That makes sense, given the use of the term "membership" by financial services companies, *see, e.g.,* American Express Membership Rewards, https://rewards.americanexpress.com/myca/loyalty/us/catalog/mrhome.do.; gyms, *see, e.g.*, Equinox: Choose Membership, https://www.equinox.com/join-membership/253; hotels, *see, e.g.*, IHG Rewards Club, https://www.ihg.com/rewardsclub/us/en/enjoy-rewards ("As an IHG Rewards Club member, you deserve exclusive rewards and recognition for your loyalty."); and airlines, *see, e.g.*, United Airlines, MileagePlus Enrollment, https://www.united.com/ual/en/us/account/enroll/default ("The United MileagePlus program offers great rewards for members."), among other businesses.

mutual fund investors lacked associational standing because it was not steered by its purported members and did not receive funding from such members); *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002) (magazine lacked associational standing because readers and subscribers did not select leadership, guide activities, or finance activities); *Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979) (indicia of membership includes financing and controlling activities of association; "members . . . normally exercise a substantial measure of power or control over an organization").[6]

Here, the individual declarations allege, with no additional information, that the declarants are "members" of the AARP. Given Plaintiff's burden to establish standing to the summary judgment standard, those declarations are plainly inadequate. And were the court inclined to go beyond the declarations, it appears that the AARP's activities are guided by a Board of Directors, not the "membership" of the organization. *See, e.g.*, AARP, AARP Names New Board Members and Officers (May 2, 2012), http://www.aarp.org/about-aarp/press-center/info-03-2012/AARP-Names-New-Board-Members-and-Officers.html ("Board of Directors is the governing body of AARP and approves all policies, programs, activities and services for AARP's millions of members."). Members of the Board of Directors appear to be selected by the Board itself, not the "membership" of the organization. *See id.* ("AARP received a large number of applicants to become a board member from AARP members all over the country in response to a call for applications. Applications were solicited online and an independent review committee evaluated

[6] One decision has suggested that the "indicia of membership" analysis applies only when an organization is not a "traditional membership organization." *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 28 (D.D.C. 2009). That decision is inconsistent with this Court's decision in *Conservative Baptist Association*, which applied the "indicia of membership" analysis to determine "whether an individual is a member of an organization." 42 F. Supp. 3d at 133. But even if being a "traditional membership organization" were sufficient to avoid the "indicia of membership" analysis, Plaintiff has put forth no evidence that it is such an organization.

the submissions and sent its recommendations to the then-current board for approval."). Indeed, it appears that the most significant feature of AARP membership is not a say in how the organization is run, but access to various discounts. *See* AARP, Member Benefits, http://www.aarp.org/benefits-discounts ("Welcome to Your Member Benefits: Members Save with AARP"); AARP Member Benefits Guide, http://www.aarp.org/content/dam/aarp/benefits_discounts/membership_services/2014-10/MBCH-GUIDE-HOTDEALS.pdf (listing available discounts and services).

Finally, there is no evidence that any of the individual declarants funds the AARP's activities. None of the declarants states that he or she has paid anything in support of the AARP. And while it appears that some members of the AARP pay membership dues, many others are granted free membership, including spouses of dues-paying members and customers of businesses that have commercial relationships with the AARP. *See, e.g.*, AARP, Join AARP Today, https://assets.aarp.org/www.aarp.org_/articles/membership/printable_app_aarp.pdf (free membership for spouses); AARP Member Advantages, https://advantages.aarp.org/en/brand.walgreens.html (referencing offer to receive a free year of AARP membership with purchase from Walgreen's); AOL, http://get.aol.com/aarp (AARP membership "is part of your AOL membership — at no additional cost!").[7]

[7] The AARP's 2015 Financial Statement indicates that of its total operating revenues of more than $1.5 billion, less than $300 million came from dues. *See* AARP, Consolidated Financial Statements Together with Report of Independent Certified Public Accountants at 4, http://www.aarp.org/content/dam/aarp/about_aarp/annual_reports/2016/2015-Consolidated-Financial-Statements-AARP.pdf. The overwhelming majority (nearly a billion dollars) came from royalties and advertising.

2. Plaintiff's Declarations Do Not Demonstrate That Any Individual Would Have Standing To Sue In His Or Her Own Right.

Even assuming that the three declarants are "members" of AARP, Plaintiff fails to show that any of these individuals has standing to sue in his or her own right as to all the claims in this case. At the outset, because these individuals are not directly subjected to the regulation that they challenge, "standing is 'substantially more difficult to establish.'" *Public Citizen*, 489 F.3d at 1289 (citing *Defs. of Wildlife,* 504 U.S. at 562). In such circumstances, mere "unadorned speculation" as to the existence of a relationship between the challenged government action and the third-party conduct "will not suffice to invoke the federal judicial power." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)).

Here, Plaintiff is challenging two EEOC regulations. One, under the ADA, permits the use of incentives to employees who participate in employee wellness programs. *See* 2016 ADA Final Rule. The second, under GINA, permits the use of incentives to employees when their spouses provide information concerning the spouse's manifestation of disease or disorder. *See* 2016 GINA Final Rule. Plaintiff must establish that at least one of its members has standing to bring each claim, but it has failed to do so.

The most obviously lacking declaration is Declaration B. The author of this declaration receives health insurance through her husband's employer, but she does not allege that her husband's employer has a wellness program of any kind, let alone a program that has ever requested (or will ever request) any medical information concerning her with any sort of inducement. The declarant simply states that if her husband's employer were to adopt such a program in the future, she could be forced to reveal the nature of her medical condition. Such unadorned speculation about possible future actions is plainly inadequate to establish standing in

these circumstances — to challenge either the ADA Rule or the GINA Rule. *See Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (no case or controversy absent "real and immediate threat" of future unlawful conduct).

Declarations A and C do each allege that the declarant receives employer-based health insurance, and that each employer offers a wellness program with incentives tied to participation. Yet neither declarant states that his employer offers incentives for spousal participation; Declaration A makes clear that his employer does not currently do so, *see* ECF No. 3, Decl. A. ¶ 5, and Declaration C does not even indicate that the declarant is married. At a minimum, it is clear that these individuals do not have standing to challenge the GINA Rule, which addresses only spousal incentives. And since Declarant C has previously participated in his employer's wellness program and presumably disclosed his confidential health information, *see id.* Decl. C ¶ 6 ("I am forced to participate"), it appears that this individual has already suffered the supposed injury that this lawsuit is seeking to prevent.[8]

B. Plaintiff Has Not Submitted Any Evidence That This Case Is Germane To Its Organizational Purpose.

Finally, Plaintiff has failed to satisfy its burden of demonstrating that this case is germane to its purpose. Although the germaneness requirement is not rigorous, it requires "that an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988); *Humane Soc'y of U.S. v. Vilsack*, 2013 WL 5346065, at *13 (D.D.C. 2013), *rev'd on other grounds*, 797 F.3d 4 (D.C. Cir. 2015).

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[8] Declarant A indicates that his employer implemented a wellness program "[t]wo years ago," *see* ECF No. 3, Decl. C ¶ 4, and that he "did not participate" in the program "this year," *id.* Decl. C. ¶ 7. Declarant C does not make clear that he has never participated in the wellness program, such that he has not already submitted his health information.

Although the Complaint baldly alleges that the interests that the AARP seeks to protect on behalf of its members are germane to the AARP's purposes, such as "addressing the needs and representing the interests of people age fifty and older and fighting to protect older people's financial security, health, well-being, and civil rights, including protections from discrimination in employment," *see* Compl. ¶ 14(b), Plaintiff has not submitted any evidence — such as by declaration or affidavit — demonstrating that it has particular interest in or special expertise concerning the medical privacy issues at stake in this lawsuit. The burden of establishing standing is the AARP's, and its failure to put in any such evidence cannot redound to its benefit.

II. Plaintiff Has Not Established Any Risk Of Irreparable Injury.

After jurisdiction, "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." Wright & Miller, Federal Practice & Procedure § 2948.1; *accord, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 38 (D.D.C. 2013). Here, neither Plaintiff nor its members faces any risk of irreparable harm as a result of the regulations that they challenge. Plaintiff contends that its members are at risk of irreparable harm because the "heavy penalties blessed by these rules . . . will coerce many of AARP's members to surrender their private medical information." Pl's Mot. at 20. That claim fails because the existing statutory and regulatory regime sharply limits the extent to which any private medical information is truly disclosed, and because any emergency is entirely attributable to Plaintiff's inexplicable delay in filing suit.

A. There Is No Risk Of Irreparable Injury Because The Existing Statutory And Regulatory Regimes Sharply Limit Disclosure Of Health Information Submitted In Connection With Wellness Programs.

The entirety of Plaintiff's theory of irreparable harm is that the incentives permitted by the challenged rules may "coerce many of AARP's members to surrender their private medical

information." Pl.'s Mot. at 20. Their primary legal support, *Hospitality Staffing Sols., LLC v. Reyes*, 736 F. Supp. 2d 192 (D.D.C. 2010), addresses the possibility of irreparable harm that could follow if "proprietary business information is disclosed to [] competitors in the market," leading to a loss of competitive advantage that could be "hard to quantify through money damages." *Id.* at 200.

At the outset, for the reasons explained more fully below, *see infra* Part III, the permitted incentives are not coercive; individuals may elect, or decline, to participate in wellness programs. But even if employees were compelled to participate, there would still be no risk of irreparable injury because the existing statutory and regulatory regimes sharply curtail the possible disclosure of health information submitted in connection with wellness programs. Under the ADA regulation, "[i]nformation obtained [through wellness programs] shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record," 29 C.F.R. § 1630.14(d)(4)(i), with exceptions only for the purposes of making reasonable accommodations, facilitating emergency treatment, and responding to requests from government officials investigating compliance with the ADA, *id.* § 1630.14(d)(4)(i)(A)-(C). The regulation further provides that a "covered entity shall not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except to the extent permitted by this part to carry out specific activities related to the wellness program), or to waive any confidentiality protections in this part as a condition for participating in a wellness program or for earning any incentive the covered entity offers in connection with such a program." *Id.* § 1630.14(d)(4)(iv); *see also* 2016 ADA Final Rule, 81 Fed Reg. at 31,126-27 (noting that a "wellness program that is part of a group health plan also must comply with HIPAA's Privacy, Security, and Breach notification requirements").

Similarly, under GINA, the challenged regulations provide that "individually identifiable genetic information" must be "provided only to the individual (or family member if the family member is receiving genetic services) and the licensed health care professionals or board certified genetic counselors involved in providing such services, and [may not be] accessible to managers, supervisors, or others who make employment decisions, or to anyone else in the workplace." 29 C.F.R. § 1635.8(b)(2)(i)(D). As under the ADA, a covered entity may not "condition participation in an employer-sponsored wellness program or provide any inducement to an employee, or the spouse or other covered dependent of the employee, in exchange for an agreement permitting the sale, exchange, sharing, transfer, or other disclosure of genetic information, including information about the manifestation of disease or disorder of an employee's family member (except to the extent permitted by paragraph (b)(2)(i)(D)) of this section, or otherwise waiving the protections of § 1635.9." *Id.* § 1635.8(b)(2)(iv).

Nonetheless, Declarant A speculates that his health insurer could "spam" him with unwanted solicitations because the insurer's "terms disclose" that the insurer can "use my information for business and marketing purposes, including sharing this information with affiliates undisclosed to me." ECF No. 3, Decl. A ¶ 6. The declarant has not attached the health insurance "terms" about which he is concerned, but whatever those terms provide, they cannot defeat the specific restrictions imposed by federal statute and regulation. *See also, e.g.*, Montgomery County Public Schools, MCPS Wellness Initiatives Program, Frequently Asked Questions, http://www.montgomeryschoolsmd.org/uploadedFiles/departments/ersc/employees/benefits/wellness_initiatives_faqs.pdf ("Your personal medical information is protected by the federal Health Insurance Portability and Accountability Act (HIPAA). All data submitted through

biometric health screenings and health risk assessments will be treated as confidential by your medical insurance plan. MCPS will never have access to your individual results.”).

B. Any Risk Of Irreparable Injury Is Entirely Attributable To Plaintiff’s Months-Long Delay In Filing Suit.

Preliminary injunctions preserve the status quo long enough for the Court to enter a judgment on the merits. *See, e.g.*, *Aamer*, 742 F.3d at 1043. In this case, however, the Court could have had sufficient time to reach a judgment on the merits if not for Plaintiff’s five-month-long delay in filing this lawsuit — from mid-May 2016, when the rules were finalized, until late October 2016, with only two months remaining until the rules were to take effect.

As many courts have concluded, failure to timely seek a preliminary injunction “undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.” *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (internal quotation marks and citation omitted). “An unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.” *Newdow*, 355 F. Supp. 2d at 292; *accord, e.g.*, *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (plaintiffs had waited 44 days until after final regulations were issued, although they had notice of a public comment period); *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 286 (D.D.C. 2005) (five-month delay indicates that Plaintiff was “not concerned enough” to file suit); *Mylan Pharm. v. Shalala*, 81 F. Supp. 2d 30, 43-44 (D.D.C. 2000) (noting that an over two-month delay “further militates against a finding of irreparable harm”); *see also Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) (“Delay in pursuing a preliminary injunction may raise questions regarding the plaintiff’s claim that he or she will face irreparable harm if a preliminary injunction is not entered.”); *Gonannies, Inc. v. Goupair.Com,*

Inc., 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006) ("Evidence of an undue delay in bringing suit may be sufficient to rebut the presumption of irreparable harm.") (citations omitted).

III. Plaintiff Is Not Likely To Succeed On The Merits Of Its Administrative Procedure Act Claims.

Even if Plaintiff could overcome these threshold standing and irreparable harm problems, it would still not be entitled to a preliminary injunction because it is not likely to succeed on the merits of its APA claims challenging either the 2016 ADA or GINA rules.

A. The 2016 ADA Rule Is Not Arbitrary, Capricious, Or Contrary To Statute.

42 U.S.C. § 12212(d)(4)(B) provides that a "covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." *Id.* § 12112(d)(4)(B). The heart of Plaintiff's ADA claim in this case is that the statutory word "voluntary" precludes the use of incentives to encourage participation. As Plaintiff forthrightly concedes, however, "Congress did not define voluntary in the ADA." Pl's Mot. at 6. It is also undisputed that the EEOC has explicit regulatory authority under Title I of the ADA. *See* 42 U.S.C. § 12116.

Because Plaintiff is challenging the EEOC's regulatory construction of an undefined term in a statute that it administers, the Court need only determine whether the agency's construction is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Court must give "considerable weight" to an agency's interpretation of the statutory scheme it has been "entrusted to administer," and the "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. Indeed, "under *Chevron*, courts are bound to uphold an agency interpretation [so] long as it is reasonable — regardless [of] whether there may be other reasonable, or even more reasonable, views." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). Plaintiff agrees that

its claim is subject to the *Chevron* analysis. *See* Pl's Mot. at 25 (charging that the ADA Rule is "an unreasonable construction of the statutory language under *Chevron* Step II").

1. The EEOC Reasonably Concluded That Thirty-Percent Incentives Do Not Render Participation In Wellness Programs Involuntary.

In the rulemaking challenged here, the EEOC was presented with, and considered, the precise argument that Plaintiff makes in this case: "that participation in wellness programs is not voluntary when an employee has no choice or when financial penalties are the cost of opting out." 2016 ADA Final Rule, 81 Fed. Reg. at 31,133. Although the EEOC was not prepared to say that "merely offering employees a choice whether or not to participate renders participation voluntary, regardless of the consequences associated with that choice," it concluded that "given current insurance rates, offering an incentive of up to 30 percent of the total cost of self-only coverage does not, without more, render a wellness program coercive." *Id.* The EEOC further noted that it was not modifying separate language from the proposed rule providing that, "in order to be considered voluntary, an employer may not retaliate against, interfere with, coerce, intimidate, or threaten employees in violation of Section 503 of the ADA, codified at 42 U.S.C. 12203." *Id.*

Plaintiff's essential position is that incentives are necessarily coercive. As the Supreme Court recognized almost eighty years ago, however, "every rebate from a tax when conditioned upon conduct is in some measure a temptation." *Charles C. Steward Mach. Co.*, 301 U.S. at 589. "But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible." *Id.* at 589-90. The Supreme Court has relied on this principle to hold that Congress can condition the receipt of federal funds upon a State's enacting legislation that Congress could not directly coerce it into enacting, *see S. Dakota v. Dole*, 483 U.S. 203 (1987), and that Congress can tax individuals who do not purchase health insurance even though Congress

lacks the authority to coerce them to purchase health insurance in the first place, *see NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). As the *NFIB* court noted, the challenged tax did not unlawfully coerce the purchase of health insurance even though "the payment is . . . intended to affect individual conduct." *See id.* at 2596. Thus, while Plaintiff points to various comments suggesting that some individuals are encouraged to participate in voluntary wellness programs in light of the incentives associated with doing so, that is not enough under Supreme Court precedent relying upon a "robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems." *Charles C. Steward Mach. Co.*, 301 U.S. at 590. At bottom, the only question is whether it was "reasonable" for the EEOC to conclude that individuals' choices to participate in wellness programs could remain voluntary when coupled with the 30% incentive authorized by the regulation. Plaintiff cannot demonstrate that it was not.[9]

2. The EEOC Regulations Do Not Undermine The Purpose Of The ADA's Nondisclosure Provision.

Plaintiff further contends that the 2016 ADA regulation "defies the very purpose of the provision it purports to interpret." Pl's Mot. at 29. That is so, Plaintiff says, because "when employers' learn of employees' disabilities — or perceive those employees as having disabilities — those employers make unsubstantiated assumptions about the employees' abilities and safety on the job." *Id.* at 30 (citing cases finding ADA violations). As Defendant explained in establishing that none of the AARP "members" is at risk of irreparable harm, however, under the ADA regulation "[i]nformation obtained [through wellness programs] shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record," 29 C.F.R. § 1630.14(d)(4)(i), with exceptions only for the purposes of making reasonable

[9] The EEOC agrees that the 2016 ADA Rule does not satisfy a definition of "voluntary" that is equivalent to "uncompensated." *See* Pl's Mot. at 26-27. As Plaintiff recognizes, however, that is not the only reasonable definition of the word "voluntary." *See id.* at 27.

accommodations, facilitating emergency treatment, and responding to requests from government officials investigating compliance with the ADA, *id.*§ 1630.14(d)(4)(i)(A)-(C). The regulation further provides that a "covered entity shall not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except to the extent permitted by this part to carry out specific activities related to the wellness program), or to waive any confidentiality protections in this part as a condition for participating in a wellness program or for earning any incentive the covered entity offers in connection with such a program." *Id.* § 1630.14(d)(4)(iv); *see also* 2016 ADA Final Rule, 81 Fed Reg. at 31,126-27 (noting that a "wellness program that is part of a group health plan also must comply with HIPAA's Privacy, Security, and Breach notification requirements"). The ADA separately bars employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Thus, under the statutory and regulatory regime, (1) the incentives do not render participation in wellness programs involuntary, for the reasons stated in Part III.A.1, *supra*; (2) those who do participate are not "outed," since their health information must be kept strictly confidential; and (3) even if their disabilities were somehow disclosed, it would be a separate violation of the ADA to discriminate against them. Under those circumstances, Plaintiff cannot credibly contend that the 2016 ADA regulation is so contrary to the purpose of the statute that the regulation must be struck down under the deferential *Chevron* standard.

3. The EEOC Adequately Explained Its Action.

Plaintiff further contends that the 2016 ADA Rule did not provide a "reasoned explanation for its reversal" of the "longstanding position" of the EEOC that employers cannot provide any incentives or penalties." Pl.'s Mot. at 33. That claim fails. As the D.C. Circuit and Supreme

Court have made clear, and as Plaintiff acknowledges, an agency is not subject to any more scrutiny when it changes its position than it is when it writes on a blank slate. *See id.* at 32 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Rather, as Plaintiff accurately states, the agency need only "display awareness that it is changing position" and "show that there are good reasons for the new policy." Pl's Mot. at 32-33 (quoting *Fox Television Stations, Inc.*, 556 U.S. at 515).

Here, the agency satisfied this standard, clearly stating its reasons for adopting its interpretation of the voluntariness requirement. As the 2016 ADA Final Rule recognized, the Affordable Care Act explicitly permits certain wellness programs to offer rewards of up to thirty percent of the cost of coverage in which a group health plan participant and any dependents are enrolled. *See* 42 U.S.C. § 300gg-4(j)(3)(A); 2016 ADA Final Rule, 81 Fed. Reg. at 31,127 n.15. The EEOC explained that although it "recognizes that compliance with the standards in HIPAA, as amended by the Affordable Care Act, is not determinative of compliance with the ADA, we believe that the final rule interprets the ADA in a manner that reflects the ADA's goal of limiting employer access to medical information and is consistent with HIPAA's provisions promoting wellness programs." 2016 ADA Final Rule, 81 Fed. Reg. at 31129. "Accordingly, after consideration of all of the comments, the Commission reaffirms its conclusion that allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of the wellness program provisions of both laws." *Id.* Thus, the EEOC both recognized that it was modifying its position and provided its rationale for doing so. It was entirely reasonable for the EEOC to construe the ADA to not prohibit a mechanism that the ACA clearly intends to permit.

Plaintiff also complains that the EEOC construes the term "voluntary" to mean different things under GINA and the ADA, since under the ADA incentives are consistent with voluntariness whereas under GINA incentives, when paid to a spouse when the spouse provides his own genetic information, render the transaction involuntary. *See* Pl's Mot. at 34. The short answer is that the Supreme Court has repeatedly recognized that the same term may be construed differently in different statutes. *See, e.g.*, *Atl. Cleaners & Dryers v. United States*, 286 U.S. 427, 433 (1932) ("Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section."); *Envt'l Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (same). The agency's obligation under *Chevron* is merely to select a permissible meaning of the word voluntary, and Plaintiff has identified no authority for the proposition that the agency was required to select identical meanings under both the ADA and GINA.

Plaintiff further argues that the EEOC did not sufficiently explain why it selected the thirty-percent limit for incentives. *See* Pl's Mot. at 34. The EEOC, however, made clear that its "final rule interprets the ADA in a manner that reflects the ADA's goal of limiting employer access to medical information and *is consistent with HIPAA's provisions promoting wellness programs.*" 2016 ADA Final Rule, 81 Fed. Reg. at 31,129 (emphasis added). And again, the ACA explicitly provides that health-contingent wellness programs may offer rewards of up to thirty percent of the applicable cost of coverage. *See* 42 U.S.C. § 300gg-4(j)(3)(A). It was not unreasonable for the EEOC to construe the statutes that it administers to not prohibit a policy that landmark legislation explicitly permits.

Plaintiff fights this analysis, repeatedly observing that compliance with HIPAA and the ACA is not determinative of compliance with the ADA. *See* Pl's Mot. at 36. The EEOC agrees;

a health plan that complies with HIPAA can nevertheless violate the ADA. *See* 2016 ADA Final Rule, 81 Fed. Reg. at 31,129 ("[T]he Commission recognizes that compliance with the standards in HIPAA, as amended by the Affordable Care Act, is not determinative of compliance with the ADA . . . . "). Nor is it disputed that HIPAA and the ACA do not require employers to provide incentives in connection with wellness programs. *See* Pl.'s Mot. at 37. But this does not change the fact that in exercising its unquestioned statutory authority to construe a term — "voluntary" — that Plaintiff admits the statute does not define, it was entirely reasonable for the EEOC to try to avoid barring the same wellness plans that Congress had separately blessed in the ACA. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (noting that "regulatory agencies do not establish rules of conduct to last forever," and "an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances"); *Investment Co. v. U.S. Commodity Futures Trading Comm'n*, 891 F. Supp. 2d 162, 197 (D.D.C. 2012) ("[I]t was a reasonable response to 'changed circumstances' reflected in legislation and potentially risky financial market activities, for the CFTC to revise the 2003 version of Section 4.5 in order to learn more about commodities derivatives trading through registration and data reporting requirements for previously exempt entities engaging in such trading activities . . . .").

B. The 2016 GINA Rule Is Not Arbitrary, Capricious, Or Contrary To Statute.

Plaintiff further challenges the 2016 GINA Rule, which permits the use of incentives to an employee whose spouse provides the spouse's own information concerning manifestation of disease or disorder. That claim fails for many of the same reasons as Plaintiff's ADA claims, including the fact that under Title II of GINA, the EEOC has explicit rulemaking authority. *See* 42 U.S.C. § 2000ff-10.

1. The 2016 GINA Rule Is Consistent With The Text Of GINA.

Title II of GINA regulates employment discrimination on the basis of genetic information. In relevant part, it provides that it "shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee," except where (among other things) "the employee provides prior, knowing, voluntary, and written authorization" to participate in a wellness program. 42 U.S.C. § 2000ff-1(b)(2)(B). Congress defined the term "genetic information" to include, among other things, information about "the manifestation of a disease or disorder in family members of such individual," 42 U.S.C. § 2000ff(4)(A)(iii), which the EEOC agrees includes spouses of such individuals.

The 2016 GINA Rule was intended to address the fact that offering an incentive to an employee whose spouse provides information about the spouse's own "manifestation of disease," (for example, whether the spouse is diabetic), would violate the prohibition in the existing 2010 GINA regulation against conditioning an incentive on the provision of the *employee*'s genetic infromation. *See* 2016 GINA Final Rule, 81 Fed. Reg. at 31,144 ("Read one way, such a practice could be interpreted to violate the 29 C.F.R. § 1635.8(b)(2)(ii) prohibition on providing financial inducements in return for an employee's protected genetic information. This is because information an employer seeks from a spouse . . . about his or her manifestation of disease or disorder is treated under GINA as requesting genetic information about the employee.").

Plaintiff contends that the exception is inconsistent with the statutory requirement that the provision of genetic information as part of a wellness program must be voluntary. As Defendant has explained in the ADA section of this brief, however, a statutory voluntariness requirement does not categorically preclude the use of incentives. *See supra* Part III.A. While it is true that the GINA regulation generally defines "voluntariness" to preclude the use of incentives when an

employee provides his or her own genetic information, *see* 29 C.F.R. § 1635.8(b)(2)(i)(B), the 2016 Rule makes clear that this definition does not preclude an employer from offering "an inducement to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment." *Id.* § 1635.8(b)(2)(iii). That regulation is entirely consistent with the statute, insofar as (1) the EEOC was not required to interpret voluntariness by reference to incentives at all; (2) the requirement that the disclosure of genetic information as part of a wellness program be voluntary does not apply to spouses of employees, who have no employment relationship with the employer; and (3) even if the requirement of voluntariness did apply to spouses, asking spouses of employees to provide current health status information does not constitute a request for the spouse's genetic information under the statutory definition of genetic information. And as noted above, the EEOC was not required to construe the term "voluntary" identically, either across the ADA and GINA, or even within GINA.

2. The EEOC Adequately Explained The Basis For The New Exception.

Plaintiff further contends that "EEOC has made very little effort to justify its differential treatment for spousal medical history." Pl.'s Mot. at 41. This is incorrect. To the contrary, the EEOC explained that "adopting a very narrow exception that permits inducements only for a spouse's current or past health status strikes the appropriate balance between GINA's goal of providing strong protections against employment discrimination based on the possibility that an employee may develop a disease or disorder in the future or may face discrimination because a family member is expected to become ill in the future, and the goal of the wellness program provisions of the [ACA] of promoting participation in employer-sponsored wellness programs." 2015 GINA Proposed Rule, 80 Fed. Reg. at 66,856. The EEOC further explained that there is "minimal, if any, chance of eliciting information about an employee's own genetic make-up or

predisposition for disease from the information about current or past health status of the employee's spouse." *Id.*[10]

3. The EEOC's Regulatory Action Was Not Arbitrary.

Finally, Plaintiff says that even if "the 2016 GINA Rule could lawfully allow some financial penalties/incentive contingent on providing spousal medical information," the limits selected are "as arbitrary as the 2016 ADA Rule." Pl's Mot. at 42-43. Plaintiff recognizes that this challenge largely duplicates the same APA arguments that it makes with respect to the ADA Final Rule, *see id.* at 42, and the response is the same: in short, it was neither arbitrary nor capricious for the EEOC to set the permissible incentive in light of the level deemed appropriate by Congress in the ACA.

IV. The Public Interest And The Balance Of Equities Weigh Against Injunctive Relief.

Finally, the Court should deny a preliminary injunction because such an order would harm the public interest, and because the balance of the equities weighs in Defendant's favor. The entirety of Plaintiff's argument with respect to the public interest and the balance of the equities is that an injunction would protect individuals' medical privacy and maintain the status quo. *See generally* Pl's Mot. at 43-45. As described above, however, even when individuals participate in

[10] The EEOC's regulatory action further serves to avoid a conflict between Titles I and II of GINA. Title I of GINA regulates group health plans and health insurers, and it is administered by the Departments of Health and Human Services, Labor, and the Treasury. The Title I regulation prohibits the collection of genetic information for underwriting purposes, *see* 26 C.F.R. § 54.9802-3T(d)(1), 29 C.F.R. § 2950.702-1(d)(1), 45 C.F.R. § 146.122(d)(1), and it defines "underwriting purposes" in a way that would include rewards or penalties as part of wellness programs. *See* 26 C.F.R. § 54.9802-3T(a)(7), 29 C.F.R. § 2950.702-1(a)(7), 45 C.F.R. 146.122(a)(7). The regulation makes clear, however, that it is permissible for a health plan to give an enrollee a reward for completing a health risk assessment that does not include genetic information. *See* 26 C.F.R. § 54.9802-3T(d)(1) ex. 5, 29 C.F.R. § 2950.702-1(d)(1) ex. 5, 45 C.F.R. 146.122(d)(1). The regulation thus makes clear that enrollees, which can include spouses, can get rewards for providing their own current health information. Plaintiff is nonetheless asking this Court to conclude that Title II of GINA prohibits this practice.

wellness programs featuring health risk assessments, existing law keeps their medical information private and penalizes discrimination on account of disabilities and genetic status. *See supra* Part II.A. And while it is true that one of the proper purposes of a preliminary injunction is to maintain the status quo during the pendency of litigation, *see* Pl's Mot. at 43-44, it is manifestly not the law that the public interest or the equities favor the Plaintiff whenever the Plaintiff is seeking to maintain the status quo. Plaintiff's authorities do not suggest otherwise.

Where, as here, Plaintiff has failed to show that it will be harmed in the absence of emergency relief, the balance of harms weighs against a preliminary injunction. *See Getty Images News Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 124 (D.D.C. 2002) ("[T]he balance of harms clearly weighs against granting a preliminary injunction at this time . . . given the speculative nature of any actual harm to [plaintiff]."). Moreover, preliminary injunctive relief would harm the government and the public because it would prevent a federal agency charged with enforcing the law from doing so in accordance with its statutory mandate. "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008); *accord, e.g.*, *Nat'l Propane Ass'n v. U.S. Dep't of Homeland Sec.*, 534 F. Supp. 2d 16, 20 (D.D.C. 2008). Enjoining the EEOC's regulations would undermine the EEOC's attempts to bring clarity to the law and encourage participation in programs meant to bring down the cost of healthcare.

Finally, the injunction Plaintiff requests could bring about chaos for employees, employers, and health insurers. Throughout the country, employers are currently offering their employees various health coverage options for plan year 2017, based on rates set to reflect the availability of employee wellness programs. *See, e.g.*, University of Portland, Open Enrollment Now Open!, https://www1.up.edu/hr/benefits/open-enrollment.html (open enrollment runs November 2

through December 1). Some employers, including Montgomery County Public Schools, have already completed their open enrollment period for 2017. *See* Montgomery County Public Schools, 2017 Employee Benefits Open Enrollment, http://www.montgomeryschoolsmd.org/departments/ersc/employees/benefits/open-enrollment.aspx (open enrollment ended November 4, 2016); *see also* Montgomery County Public Schools, Active Employee Cost – Calendar Year 2017, http://www.montgomeryschoolsmd.org/uploadedFiles/departments/ersc/employees/benefits/employee_rates_web_2017.pdf (listing different costs depending upon participation in wellness initiatives). Plaintiff is asking this Court to upset the assumptions that various insurers and employers used to negotiate rates for 2017, even though in many cases employees have already signed up for specific coverage at specific rates. The confusion that would result from the injunction Plaintiff requests would be contrary to the public interest, and the injunction therefore should be denied.

CONCLUSION

Defendant respectfully requests that Plaintiff's motion for a preliminary injunction be denied.

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Respectfully submitted,

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